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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1392

GEORGE F. GOTTSCHALK, Jr.,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

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OPINION BELOW

The opinion of the Alaska Supreme Court in this case is found in *Gottschalk* v *State,* 602 P.2d 448 (Alaska 1979).

JURISDICTION

The Petitioner Gottschalk has properly invoked this Court's discretionary jurisdiction under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Could the trial court properly rule that Gottschalk had waived his right to counsel, and deny his motion for continuance made on the second day of trial to obtain counsel, when the trial court found that Gottschalk had both the necessary resources and a reasonable amount of time to employ counsel?

STATEMENT OF THE CASE

The Petitioner, George F. Gottschalk, Jr., was initially charged with grand larceny on August 9, 1976. (R. at 1) He was arraigned three weeks later, and he appeared at this arraignment with retained counsel. (Log Nos. 2179-2221) The attorney-client relationship eventually began to suffer, however, because Gottschalk refused to keep in touch with his attorney, and had not yet paid him for a previous representation; six weeks before Gottschalk's trial date, his attorney moved to withdraw. (R. at 47) (Log Nos. 001-0092)

The trial court concluded that, while the financial problem was not unresolvable, the personal differences between Gottschalk and his attorney were too great; the motion to withdraw was granted. (R. at 47) Trial was still scheduled for February 1, 1977. A few days before trial, Gottschalk asked the court to appoint a lawyer for him, claiming for the first time that he lacked the financial resources to employ his own attorney. In denying Gottschalk's motion for a court-appointed attorney, the trial court found (R. at 46-48):

(1) Gottschalk had never raised the question of lack of financial resources until the Friday (two working days) before trial.

(2) Gottschalk had sufficient resources to employ his own attorney, including equity in an airplane and a fishing boat, but made no real effort to collect the necessary money.

(3) Gottschalk had only contacted one other attorney in the six weeks since his first lawyer had left the case.

(4) Gottschalk had sufficient intelligence and understanding of court procedures to proceed without an attorney if need be.

Based upon these findings, the trial court ruled that Gottschalk had waived his right to an attorney, and the trial began

the next day (February 1, 1977) with Gottschalk representing himself. The trial ended on February 2nd with a hung jury.

The State indicated that it would re-try Gottschalk, and asked for a June trial date so that its witnesses could easily be present. Gottschalk told the court that he would employ his own attorney for this second trial. (Log. Nos. 0759-0861) The trial was subsequently continued until September, 1977, at Gottschalk's request, so that he could take advantage of an uninterrupted commercial fishing season.

About a week before trial, Gottschalk contacted the prosecuting attorney handling the case and requested a continuance of trial so that he could take his fishing boat to Seward (the distance involved made a round-trip impossible without a change in the trial date). While Gottschalk claims in his Petition (p. 4) that he expressly told the prosecutor the trip was for the purpose of obtaining funds to employ an attorney, the State of Alaska does not believe the record bears him out. (Tr. at 106-07) In any event, Gottschalk made no attempt to apply to the trial court for a continuance (after the prosecutor refused to stipulate to one) until the day of trial. *Gottschalk* v *State,* 602 P. 2d at 450.

The second trial began on September 21, 1977, with Gottschalk again representing himself. Sometime during the afternoon, Gottschalk obtained a loan from a friend to hire an attorney. When court resumed session the next day to continue jury selection, Gottschalk requested a four-day continuance to consult with attorney Anthony Smith and prepare a defense; Gottschalk told the court that Smith would be arriving by plane that afternoon. 602 P.2d at 450. The trial court denied this motion.

Jury selection was completed, and the State presented all but one witness, A recess was then called, due to the fact that

the State's last witness would not arrive by plane for another hour. During this recess, the prosecutor proposed two jury instructions. Gottschalk again asked for a continuance, but the trial court denied it, noting that attorney Smith had never entered an appearance in the case and would therefore not be allowed to intervene in it.

Anthony Smith arrived that afternoon, after the final prosecution witness had testified. Gottschalk again requested a continuance (this time, only until the following morning) to consult with Smith about the possible presentation of a defense. The trial court indicated that it might relent from its earlier refusal to allow Smith to intervene, providing Smith would enter a formal appearance on behalf of Gottschalk. However, attorney Smith declined to enter an appearance until he had time to study the case. At this point, the court again denied Gottschalk's motion for continuance.

The trial proceeded with Gottschalk choosing to present no defense. This time, the trial ended in a verdict of guilty on the lesser-included offense of petit larceny (a misdemeanor). Gottschalk received a sentence of six months' imprisonment, with three suspended; he was placed on probation for two years.

(All of the above facts are taken from the Alaska Supreme Court's recital of the case, 602 P.2d at 450.)

Gottschalk then appealed his conviction to the Alaska Supreme Court, alleging that his right to counsel had been denied. In rejecting Gottschalk's claim and affirming his conviction, the Alaska court ruled that the seven months between Gottschalk's first trial and his second afforded him adequate opportunity to engage an attorney (602 P.2d at 451), and that Gottschalk's claim of financial incapacity to hire his own lawyer was "contrived and unpersuasive". (602 P.2d at 450, and especially n. 4)

The Alaska court also ruled that the trial court had acted correctly when it found that Gottschalk had waived his right to counsel at the hearing held just before Gottschalk's first trial. The supreme court found that the record affirmatively showed (1) Gottschalk's understanding of the benefit he was giving up, (2) his failure to retain an attorney even though he was afforded reasonable time and possessed adequate resources, and (3) his ability to present his own case in a rational and coherent manner. (602 P.2d 451)

This being so, and with the underlying circumstances essentially unchanged at the beginning of the second trial, the Alaska court ruled that there was no legal necessity for the trial court to hold another hearing on the issue prior to Gottschalk's second trial.

REASONS FOR DENYING THE WRIT

THE ALASKA SUPREME COURT FOLLOWED THE APPLICABLE FEDERAL AUTHORITY ON RIGHT TO COUNSEL IN AFFIRMING GOTTSCHALK'S CONVICTION

Gottschalk's complaint is two-fold. He argues that the Alaska court erroneously found him to have waived his right to counsel, and he argues that the Alaska court erred when it upheld the trial court's decision to deny Gottschalk's motion for continuance (made mid-way during his second trial).

First, it is clear that if a person has adequate resources to employ an attorney and an adequate opportunity to do so, and yet no attorney is employed, a waiver of the right to counsel may be inferred. *United States* v *Casey*, 480 F.2d 151 (5th Cir. 1973); *United States* v *McMann*, 386 F.2d 611 (2nd Cir. 1967);

see also *Relerford* v *United States*, 309 F.2d 706 (9th Cir. 1962).

On the day before Gottschalk's first trial commenced, the trial court found that Gottschalk had waived counsel under the above test, and further found that Gottschalk understood the benefits of counsel that he was foregoing, and was capable of proceeding without counsel. As noted by the Alaska supreme court, Gottschalk has never questioned the correctness of that particular ruling. (602 P.2d at 451) Further, the record supports the trial court's ruling. Finally, the fact that Gottschalk represented himself at his first trial (which ended in a hung jury) inferentially supports the trial court's finding of Gottschalk's capacity to present a coherent defense.

Gottschalk's argument to the Alaska supreme court was that the trial court should have held yet another hearing on this same issue before allowing Gottschalk's second trial to commence. But there is nothing in the record to demonstrate that anything had changed in regard to either Gottschalk's understanding of the benefits of an attorney or Gottschalk's ability to conduct his own defense.

Since Gottschalk had more than seven months to employ an attorney for his second trial (after indicating to the court that he would retain private counsel), the only facet of the test that might have changed was Gottschalk's financial ability to hire a lawyer. The trial court found, and the Alaska Supreme agreed, that Gottschalk had sufficient resources to hire an attorney. Gottschalk never asked for a court-appointed attorney for his second trial, and on appeal the Alaska court found his arguments of insufficient resources to be unconvincing. Gottschalk has not presented anything in the record to rebut this conclusion by the Alaska Supreme Court, and indeed Gottschalk retained counsel to prosecute his appeal both in Alaska and before this Court.

Gottschalk then argues that, even assuming the legal validity of the court's finding that he had waived his right to counsel, the court erred in denying him a continuance (after the second trial had begun) to consult with a lawyer that Gottschalk was flying in from Anchorage. In other words, Gottschalk is arguing that he was free to change his mind and seek legal counsel even at that late date. This is not so. *United States* v *Casey, supra, United States* v *McMann*, supra, *United States* v *Yamashita*, 527 F.2d 954 (9th Cir. 1975).

The question involves a balancing of the defendent's right to an attorney versus the real possibility that a defendant may attempt to thwart the orderly working of the courts by retaining or discharging counsel at critical times so as to create confusion or delay. The decision regarding a continuance of trial under the circumstances presented by Gottschalk's case is entrusted to the discretion of the trial court, and this decision will not be overturned unless the court's discretion has been abused. *Ungar* v *Sarafite*, 376 U.S. 575 (1964).

The Alaska Supreme Court recognized this to be the controlling law, and on the facts of Gottschalk's case found that the trial court had not abused its discretion. Gottschalk's failure to have an attorney at the commencement of the second trial was clearly due to his own lack of diligence, rather than factors beyond his control. When the trial court finally agreed to meet Gottschalk halfway if attorney Smith would enter an appearance, Smith declined to do so.

CONCLUSION

The Alaska Supreme Court did not depart from federal precedent in this case, either on the issue of waiver of right to

counsel, or on the issue of the trial court's failure to grant Gottschalk's tardily requested continuance of his second trial. Neither the law nor the facts of this case cry out for a different result. Gottschalk's petition for writ of certiorari should be denied.

Respectfully submitted this 19th day of May, 1980.

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